IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AMERICAN INVESTORS LIFE INSURANCE CO. ANNUITY MARKETING AND SALES PRACTICES LITIGATION	:	MDL DOCKET NO. 1712
Relates to: PRICE v. AMERUS ANNUITY GROUP COMPANY, No. 04-3329 and MILLER v. AMERUS GROUP COMPANY, No. 04-3799	:	

MEMORANDUM AND ORDER

McLaughlin, J. June 2, 2006

In these two putative class actions, the plaintiffs sue several defendants for damages arising from alleged fraudulent schemes involving the sale of unnecessary and unsuitable estate planning instruments and annuities. The defendants allegedly participated in the scheme through their involvement in one of three groups: the “Annuity Group” (AmerUs Group Co., AmerUs Annuity Group Co. (AAG), and American Investors Life Insurance Company, Inc. (AILIC)); the “Sales Group” (Brian J. Newmark, Estate Planning Advisors Corp. (EPAC), Ben Consulting Group (BEN), Funding & Financial Services (FFS), Victoria L. Larson, Kenneth Krygowski, Stephen Strope, Patriot Group, and/or Addison Group); and the attorneys (Barry O. Bohmueller or Brett Weinstein).

The plaintiffs bring claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, as well as numerous claims based on state law. The Court concludes that the plaintiffs have failed to state a claim under RICO. Because RICO is the basis of the Court's subject matter jurisdiction, the Court will not address the plaintiffs' state law claims at this time. The Court will, however, dismiss all claims against certain defendants because the complaints do not allege any facts concerning their involvement in the alleged wrongful activities in these cases. The Court will allow the plaintiffs to amend their complaints.

I. Factual Background

The complaints are long (each in excess of fifty pages) and contain many conclusory factual and legal contentions. Accepting the facts alleged in the complaints as true, the following events gave rise to this litigation.[1]

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1. When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court accepts all facts and allegations listed in the complaint as true and construes them in the light most favorable to the plaintiff. H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989); Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Beryl and Charlotte Price

In early 2002, in response to a newspaper advertisement, Beryl and Charlotte Price attended a seminar on EPAC's estate planning services. The Prices were in their mid-seventies at the time. At the seminar, Victoria Larson and other EPAC representatives made a presentation detailing how EPAC's services could benefit the Prices and the other attendees. (Price Compl. ¶¶ 37-38.)

Shortly after the seminar, Ms. Larson called the Prices twice, and arranged to meet with them in their home. During that meeting, on or around January 23, 2002, Ms. Larson spoke to the Prices about the ostensible advantages of a living trust. Ms. Larson led the Prices to believe that she was a qualified, experienced estate planner working with the office of Attorney Barry O. Bohmueller. She did not disclose that she was a licensed insurance agent or that she received commissions for the sale of living trusts and annuities. (Id. ¶¶ 38-41.)

Directly after the meeting, the Prices gave Ms. Larson a check for $1,845.00 payable to "Bohmueller Law Offices" for the purchase of a living trust kit. The Prices received an Engagement Letter from Attorney Bohmueller, which stated that he would consult with them and prepare a basic estate planning package. (Id. ¶¶ 42, 44(a).)

On February 13, 2002, Attorney Bohmueller sent the living trust documents to EPAC for delivery to the Prices. On the same day, Attorney Bohmueller sent one or more letters to the Prices, appointing Ms. Larson as his delivery agent for the living trust kit and asking the Prices to confirm receipt of the documents. (Id. ¶ 42, 44(b).)

On or around February 28, 2002, Ms. Larson returned to the Prices' home to deliver a loose leaf binder containing the living trust documents that Attorney Bohmueller had ostensibly prepared. Ms. Larson explained the legal provisions of the documents, showed the Prices where to sign, and notarized several of the signed documents. (Id. ¶ 43.)

Ms. Larson told the Prices that she or Attorney Bohmueller would take all of the necessary actions to properly establish and fund the living trust. She did not inform the Prices that they needed to transfer their residence or any other assets into the trust, and she did not do so on their behalf. (Id. ¶¶ 56-57.)

In the course of selling the Prices the living trust kit, Ms. Larson also persuaded the Prices to liquidate a total of $61,000 from their IRA accounts to purchase two AILIC deferred annuities. Payments on both annuities began after ten years. Ms. Larson told the Prices that the rate of return on the annuities would be greater than what they were earning from their

current investments, and that the interest rate on the annuities could only increase. (Id. ¶¶ 47-48, 50.)

When the Prices told Ms. Larson that they wanted 25% of their investment to be available for distribution the following year, she assured them that the annuities would allow such a distribution. She did not disclose that the annuities imposed penalties for early withdrawals. (Id. ¶ 51.)

On March 20 and April 10, 2002, AILIC, through AAG, mailed the Prices letters indicating that it had sent the annuities to Mr. Newmark for delivery to Mr. Price. (Id. ¶ 52.)

On September 27, 2002, Mr. Newmark and EPAC wrote a letter to the Prices informing them that they would begin to receive EPAC's newsletter, "Advisor Quarterly," which would contain financial advice and "other senior related topics." In the letter, Mr. Newmark also asked the Prices to call EPAC if they were solicited by other organizations about estate planning or other financial services. (Id. ¶ 54.)

When the Prices did not receive their expected distribution from the annuities the following year, they contacted Ms. Larson. She told them that there was nothing she could do for them. (Id. ¶ 56.)

B. Joseph Healy

In or around August 2001, Joseph Healy attended an

estate planning seminar sponsored by FFS. Mr. Healy was eighty-five years old at the time. At the seminar, Ms. Larson gave Mr. Healy a piece of paper that indicated that she was a "Certified Senior Advisor" for EPAC. (Id. ¶¶ 61-62.)

Sometime after the seminar, Ms. Larson and Mr. Krygowski visited Mr. Healy at his home to discuss his estate plan and the purported advantages of a living trust. Ms. Larson and Mr. Krygowski also led Mr. Healy to believe that they were qualified and experienced estate planners working with Attorney Bohmueller's office. Ms. Larson gave Mr. Healy a card from "Bohmueller Law Offices" on which she had written her name. Neither Ms. Larson or Mr. Krygowski told Mr. Healy that they were licensed insurance agents or that they received commissions for the sale of living trusts and annuities. (Id. ¶¶ 62-64.)

On or around August 29, 2001, Mr. Healy gave Mr. Krygowski a check for $1,795.00 payable to "Bohmueller Law Offices" for the purchase of a living trust kit. Like the Prices, Mr. Healy received an Engagement Letter from Attorney Bohmueller stating that he would consult with Mr. Price and prepare a basic estate planning package for him. (Id. ¶ 65.)

On or around November 26, 2001, Ms. Larson and Mr. Krygowski persuaded Mr. Healy to purchase an AILIC deferred annuity. Neither Ms. Larson or Mr. Krygowski disclosed that the annuity imposed penalties for withdrawals on the principal in the

first ten years. Payments on the annuity were scheduled to begin in fifteen years. (Id. ¶¶ 65-67.)

AILIC issued Mr. Healy's annuity on December 12, 2001. On or around that date, AAG mailed the annuity to Mr. Krygowski for delivery to Mr. Healy. The annuity was delivered to Mr. Healy on December 19, 2001. On January 14, 2002, AAG mailed Mr. Healy a letter signed by AAG's president and CEO thanking him for selecting AILIC as his annuity provider. (Id. ¶¶ 67-69.)

On March 4, 2002, Mr. Healy mailed a letter to Ms. Larson at FFS, formally rescinding his purchase of the annuity. Mr. Healy copied Mr. Krygowski, Mr. Newmark, and AILIC on the letter. (Id. ¶ 72.)

Sometime in March or April 2002, Mr. Healy sought the advice of a trusts and estates attorney to determine the legitimacy of the living trust kit and the suitability of the annuity he had purchased. On May 29, 2002, Mr. Healy's attorney wrote to AILIC and again sought to rescind the annuity. AAG responded on July 22, 2002 that it would not honor a rescission. (Id. ¶¶ 72-74.)

C. George Miller

Sometime in 1999, George Miller responded by mail to a newspaper advertisement concerning Weinstein living trusts. Mr. Miller was seventy-four years old at the time. Ms. Larson and

other representatives of Addison Group informed Mr. Miller that they could provide estate planning services that would benefit him. Ms. Larson telephoned Mr. Miller to arrange to meet with him in his home. (Miller Compl. ¶¶ 45-47.)

Ms. Larson met with Mr. Miller once, on or about June 22, 1999. She spoke with Mr. Miller about the supposed advantages of a living trust, and led him to believe that she was a qualified estate planner working with Attorney Brett Weinstein. She did not inform Mr. Miller that she was an insurance agent, or that she received commissions from the sale of living trusts and annuities. That day, Mr. Miller gave Ms. Larson a check for $1,995 payable to Attorney Weinstein for the purchase of a living trust kit. (Id. ¶¶ 48-53).

Following Ms. Larson's meeting with Mr. Miller, Attorney Weinstein appointed Stephen Strope to be his delivery agent for the living trust kit. On August 5, 1999, Mr. Strope visited Mr. Miller to deliver the living trust documents ostensibly prepared by Attorney Weinstein. Mr. Strope explained various provisions in the documents, showed Mr. Miller where to sign, and notarized some of the signed documents. Like Ms. Larson, Mr. Strope led Mr. Miller to believe that he was a qualified estate planner working with Attorney Weinstein, and did not inform Mr. Miller that he was an insurance agent who received commissions from the sale of living trusts and annuities. (Id.

¶¶ 51-52, 58-60.)

During this period of time in 1999, Mr. Strope persuaded Mr. Miller to liquidate $215,000 from his investment portfolio of predominately blue chip investments to purchase an annuity from American Equity Investment Life Insurance Company, Inc. (American Equity). Mr. Strope told Mr. Miller that the rate of return on the annuity would be 26.95% per annum, and that the annuity would make Mr. Miller a millionaire in five years. Mr. Strope did not disclose that the annuity would not make any payments for ten years, or that it imposed surrender charges for early withdrawals of principal. (Id. ¶¶ 54-57.)

In 2000, Mr. Miller received a statement in the mail from American Equity and discovered that the rate of return for the annuity was 3% as opposed to the 26.95% Mr. Strope had promised. When Mr. Miller complained to Mr. Strope, Mr. Strope blamed the decreased rate of return on the decline in the stock market. (Id. ¶ 61.)

Mr. Strope then convinced Mr. Miller to purchase an annuity from AILIC. Mr. Strope did not disclose to Mr. Miller that this annuity would not make payments for fifteen years, or that it also imposed early surrender charges. (Id. ¶ 62.)

In June 2003, Mr. Strope called to inform Mr. Miller that he had switched companies, and would fix what was wrong with the prior annuities. He persuaded Mr. Miller to surrender his

American Equity annuity, thereby incurring a surrender charge of over $20,000, to purchase an annuity from National Western Life Insurance Company, Inc. (National Western). Mr. Strope guaranteed Mr. Miller that the National Western annuity rate of return would never be less than 12%. Mr. Strope did not disclose that this annuity would not make payments for twenty years, or that it imposed early surrender charges as well. National Western issued this annuity on June 18, 2003. Mr. Miller was 79 years old by this time. (Id. ¶¶ 63-65.)

Mr. Strope has not responded to Mr. Miller's attempts to contact him since he purchased the National Western annuity. When Mr. Miller telephoned Attorney Weinstein to complain about Mr. Strope, Weinstein told Miller that Strope had worked for him, but that he had fired him because of his poor performance. In fact, Attorney Weinstein had never employed Mr. Strope directly; rather, Strope worked for the Sales Group on Weinstein's and the Annuity Group's behalf. (Id. ¶ 67.)

II. Description of the Defendants

According to the complaints, the three groups of defendants cooperated in the sale of living trust kits and annuities in the following manner.

A. Annuity Group

Members of the Annuity Group allegedly issued, underwrote, and profited from the sale of unsuitable annuities, less the commissions paid to members of the Sales Group. (Price Compl. ¶ 102(c); Miller Compl. ¶ 94(c).)

Both the Price and Miller complaints name AmerUs Group, AAG, and AILIC as the Annuity Group defendants. AILIC is a wholly owned subsidiary of AAG. AAG is a wholly owned subsidiary of AmerUs Group Co. (Price Compl. ¶ 18; Miller Compl. ¶ 19.)[2]

B. Sales Group

The Sales Group allegedly performed the legwork that induced members of the putative classes to purchase living trust kits and annuities. Sales Group members allegedly were agents of one or more of the Annuity Group defendants and one or both of the attorneys. (Price Compl. ¶¶ 4, 102(a); Miller Compl. ¶¶ 4, 94(a).)

Both the Price and Miller complaints name Mr. Newmark, EPAC, BEN, FFS, and Ms. Larson as members of the Sales Group. Mr. Newmark was the President of EPAC and BEN, and the principal and/or controlling person of FFS. He was also an independent

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2. The plaintiff in Miller initially named National Western Life and American Equity as additional defendants in the Annuity Group, but has since voluntarily dismissed all claims against them.

insurance agent appointed with AILIC and AAG. EPAC (previously named FFS) and BEN engaged in the business of marketing and selling living trust kits drafted by Attorney Bohmueller and/or Attorney Weinstein, and annuities underwritten by AILIC and/or AAG. FFS sponsored and presented seminars on estate planning. Ms. Larson worked for Mr. Newmark and/or his companies, and was also an agent of the Annuity Group defendants. (Price Compl. ¶¶ 20-24; Miller Compl. ¶¶ 25-28, 32.)

In addition, the Price complaint alone names Kenneth Krygowski as another member of the Sales Group. Mr. Krygowski worked for one or more of Mr. Newmark's companies, and was also an agent of AAG and AILIC. (Price Compl. ¶ 25.)

The Miller complaint alone names Stephen Strope, Patriot Group, and Addison Group as additional members of the Sales Group. Mr. Strope worked for EPAC, Patriot Group, and Addison Group, and was also an agent of one or more of the Annuity Group defendants. Both Patriot Group and Addison Group employed one or more salespersons who worked on behalf of one or more of the Annuity Group defendants. (Miller Compl. ¶¶ 29, 31, 33.)

C. Attorneys

The attorneys ostensibly prepared the living trust documents. They helped members of the Sales Group to profit from

selling the living trust kits and annuities by allowing them to cloak the sales as part of an attorney-client relationship. (Price Compl. ¶ 102(b); Miller Compl. ¶ 94(b).)

The Price complaint names Barry O. Bohmueller as the attorney defendant; the Miller complaint names Brett Weinstein.

III. Overview of the Claims

The plaintiffs have brought nine-count complaints against the defendants as follows:

Counts	**Price**	**Miller**
I: Violation of RICO	All defendants	All defendants
II: Violation of the Pennsylvania UTPCPL	All defendants	All defendants
III: Bad Faith	AILIC and AAG	AILIC, AAG, and AmerUs Group
IV: Negligent Supervision	AILIC, AAG, AmerUs Group, and Bohmueller	AILIC, AAG, AmerUs Group, and Weinstein
V: Respondeat Superior	AILIC, AAG, AmerUs Group, and Bohmueller	AILIC, AAG, AmerUs Group, and Weinstein
VI: Fraudulent Misrepresentation	All defendants	All defendants
VII: Negligent Misrepresentation	All defendants	All defendants
VIII: Civil Conspiracy	All defendants	All defendants
IX: Quantum Meruit/Unjust Enrichment	All defendants	All defendants

Each defendant, except Addison Group, has moved to dismiss. The following motions to dismiss are pending before the Court:

- AmerUs Group, AAG, and AILIC's motions to dismiss the entirety of both complaints;
- Mr. Newmark, EPAC, BEN, FFS and Ms. Larson's motions to dismiss all counts against Mr. Newmark, EPAC, BEN, and FFS, and Counts VI-VIII against Ms. Larson, in both complaints;
- Mr. Krygowski's motion to dismiss all counts against him in the Price complaint;
- Mr. Strope's motion to dismiss Counts I and VI-VIII of the Miller complaint;
- Patriot Group's motion to dismiss Counts I and VI-VII of the Miller complaint;
- Attorney Bohmueller's motion to dismiss Counts I-II and VI of the Price complaint; and
- Attorney Weinstein's motion to dismiss Counts I-II and VI-VIII of the Miller complaint.

IV. Analysis

The Court will first discuss which defendants should be dismissed because there are no allegations of wrongdoing in fact against them. Then the Court will turn to the merits of the RICO claim.

A. Defendants Dismissed for Failure to State Any Claim

BEN should be dismissed from the Price case because the complaint does not allege that BEN engaged in any wrongdoing with

respect to the Prices or Mr. Healy. The plaintiffs attempt to implicate BEN because, like EPAC and FFS, it was one of Mr. Newmark's companies and also engaged in the business of selling living trusts and annuities. The complaint contains no facts suggesting that BEN made any misrepresentations, or employed Ms. Larson or Mr. Krygowski at the time they made alleged misrepresentations to the plaintiffs, however.

In addition, BEN, FFS, and Mr. Newmark should be dismissed from the Miller case because the complaint does not allege that these defendants did anything in fact in relation to Mr. Miller. Although Ms. Larson and/or Mr. Strope may have worked for BEN or FFS at some point in time, the complaint contains no facts suggesting that Ms. Larson or Mr. Strope were so employed at the time they made the alleged misrepresentations to Mr. Miller.

B. RICO Claim (Count I)

The plaintiffs allege that each of the defendants violated section 1962(c) of the RICO statutes, which provides in relevant part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1962(c). The plaintiffs bring suit under section

1964(c), which gives a private right of action to "any person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c).

To state a claim for a violation of section 1962(c), a plaintiff must allege that the defendant (1) conducted or participated in the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). The moving defendants argue that the plaintiffs have not adequately alleged one or more of these elements.[3]

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3. Although Ms. Larson has not moved to dismiss the RICO claim and Addison Group has not filed any motion to dismiss, the Court may consider sua sponte the plaintiffs' ability to state a RICO claim against these defendants as well. District courts may dismiss complaints under Rule 12(b)(6) sua sponte if service has been made and the plaintiff has had an opportunity to address the issue. Grayson v. Mayview State Hosp., 293 F.3d 103, 111 n.15 (3d Cir. 2002) (sua sponte dismissal appropriate only after service of process); Oatess v. Sobolevitch, 914 F.2d 428, 430 n.5 (3d Cir. 1990) (same); Roman v. Jeffes, 904 F.2d 192, 196 (3d Cir. 1990) (court may raise deficiency of complaint on its own initiative, but plaintiff must have notice and an opportunity to respond orally or in writing); Dougherty v. Harper's Magazine Co., 537 F.2d 758, 761 (3d Cir. 1976) (same).

Ms. Larson's counsel accepted service on her behalf on the Price and Miller complaints on August 12 and 19, 2004, respectively. (Price Doc. No. 15; Miller Doc. No. 6.) The Miller complaint was served on Addison Group on October 18, 2004, pursuant to Fed. R. Civ. P. 4(c)(2) and the Court's October 4, 2004 Order. (Miller Doc. Nos. 36, 42.)

The Court has not questioned the adequacy of the plaintiffs' RICO pleadings on its own initiative. The moving defendants raised and briefed this issue; the Court is only applying the moving defendants' arguments to the nonmoving defendants on its own initiative. The plaintiffs have had

The Court will begin by determining whether the plaintiffs have adequately pled the existence of a RICO enterprise. The Court will then discuss the conduct or participation, racketeering activity, and pattern elements.

1. Existence of a Enterprise

An enterprise under RICO may be an individual, a legal entity such as a corporation, or "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Price plaintiffs allege an association in fact enterprise consisting of all the defendants in that case. The Miller plaintiffs allege an association in fact consisting of all the defendants originally named in that case, including National Western and American Equity.[4] The Court finds that the plaintiffs have failed to plead a valid RICO enterprise.

To prove that a RICO enterprise exists, plaintiffs must demonstrate: (1) an ongoing organization, formal or informal; (2) that the various associates function as a continuing unit; and (3) that the enterprise has an existence separate and apart from the alleged pattern of racketeering activity. United States v.

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opportunities to respond, and have responded, to these arguments both in writing and at oral argument.

4. The plaintiff in Miller has voluntarily dismissed his claims against National Western and American Equity, but has not amended the complaint to remove these entities from the alleged enterprise.

Turkette, 452 U.S. 576, 583 (1981); United States v. Riccobene, 709 F.2d 214, 221 (3d Cir. 1983).

In Riccobene, the United States Court of Appeals for the Third Circuit explained that the first Turkette element requires a showing that "some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." Id. at 222. In other words, "there must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than ad hoc, basis." Id.

Here, the complaints do not permit an inference that any organizational structure connected or controlled the various defendants. The plaintiffs have alleged that the Sales Group members were agents of the attorneys and the Annuity Group members. (Price Compl. ¶ 4; Miller Compl. ¶ 4.) The complaints do not allege how the attorneys and the Annuity Group were related, however. They could not have been controlled by Sales Group members, because, according to the complaints, the Sales Group members worked for them. The Miller complaint, moreover, does not allege any relationship between the AmerUs companies, National Western, and American Equity, or explain how these three competitors could have been working together towards a common goal. Overall, the pleadings fail to show how the defendants would have worked together to make decisions or resolve disputes.

The plaintiffs do allege that the defendants performed

certain critical roles within the enterprise: the attorneys prepared the living trust documents and helped Sales Group members gain access to the plaintiffs under the guise of an attorney-client relationship; the members of the Sales Group performed the legwork in selling the living trust kits and annuities; and the members of the Annuity Group provided the annuities. The plaintiffs also allege that "[e]ach Defendant was . . . aware that other members of the enterprise were . . . acting to advance the enterprise's scheme . . . ." (Price Compl. ¶¶ 102-104; Miller Compl. ¶¶ 94-96.)

The fact that the defendants played particular roles and were aware of each other's actions does not show a decision-making structure, however. Participants in any conspiracy will play certain roles and have some idea of what the other participants are doing. Allegations demonstrating a conspiracy to perform an underlying criminal offense, standing alone, are not sufficient to allege the existence of an enterprise. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 790 n.5. (3d Cir. 1984). The plaintiffs have described what may appear to be an enterprise from the outside, but the collection of entities and individuals contains no organizational structure on the inside.[5]

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5. Zito v. Leasecomm Corp., 02-CIV-8074, 2004 U.S. Dist. LEXIS 19778 (S.D.N.Y. Sept. 30, 2004), does not validate the plaintiffs' enterprise pleadings. The plaintiffs in Zito alleged

Several Courts of Appeals have rejected association in fact enterprise pleadings where the plaintiffs failed to allege any organizational structure for the enterprise. See Vandenbroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 700 (6th Cir. 2000) (alleged enterprise "too unstable and fluid an entity to constitute a RICO enterprise"); Stachon v. United Consumers Club, Inc., 229 F.3d 673, 676 (7th Cir. 2000) (refusing to accept "vague allegations of a RICO enterprise made up of a string of participants . . . lacking any distinct existence and structure"); Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th Cir. 2000) (affirming dismissal where plaintiff "never alleged the existence of a system of authority that guided

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that, as an association in fact, Leasecomm, its parent company MFI, and their dealers and vendors worked together to deceive customers into signing non-negotiable and deceptive leases on Leasecomm's overpriced and ineffective products. MFI/Leasecomm then allegedly used extreme collection and enforcement tactics against defaulting lessees. Id. at *3-4. The court found that the plaintiffs had properly pleaded an enterprise with a "hub and spoke" type structure, based on allegations that Leasecomm carefully vetted and supervised its dealers and centrally controlled the enterprise, and that the dealers understood that their arrangement with Leasecomm was part of a larger structure erected by MFI/Leasecomm. Id. at *24-28.

Unlike the plaintiffs in Zito, the plaintiffs here have not alleged that any entity centrally controlled the alleged enterprise. Sales Group members cannot be the "hub" here, because, as noted above, the complaints allege that the Sales Group members worked for the Annuity Group members and the attorneys. The complaints also preclude either Annuity Group members or the attorneys from being the "hub," because the complaints do not allege any direct relationship between the Annuity Groups and the attorneys.

the operation of the enterprise"). See also Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42 n.7 (1st Cir. 1991) (approving dismissal where complaint contained "no allegations articulating how any of the [defendants] may have comprised part of an 'ongoing organization'").

In Vandenbroeck, the alleged enterprise was an association in fact between a mortgage lender and numerous secondary lenders with whom it did business. The plaintiffs alleged that after obtaining a proposed interest rate from one of the secondary lenders, the mortgage lender would itself make a loan with an inflated interest rate and hidden fees, then sell the loan to the secondary lender and pocket a fee. 210 F.3d at 698-699. The court found that the complaint failed to show any type of mechanism by which this alleged group conducted its affairs or made its decisions. Id. at 700. The court held that allegations that certain parties did business with one another, or even allegations that they conspired together, were "not enough to trigger [RICO liability] if the parties [were] not organized in a fashion that would enable them to function as a racketeering organization for other purposes." Id. at 699.

The alleged enterprise in Stachon was an association in fact consisting of a wholesale "buying club," its franchisees, manufacturers, wholesalers, and members. The plaintiffs alleged that the buying club fraudulently induced them to join by

misrepresenting the quality of its merchandise, its prices, and its buying power. 229 F.3d at 674. Like the Vandenbroeck court, the Stachon court held that the fact that the members of the alleged group had business dealings with one another over many years did not establish that they functioned as an ongoing structured organization. Id. at 677.

The Court is persuaded by these cases that, even under the liberal notice pleading standards, the enterprise pleadings here are inadequate.[6] The United States Court of Appeals for the Third Circuit's decisions in Seville Indus. Mach. Corp. v.

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6. The Court reaches this conclusion without deciding whether the plaintiffs have alleged the second and third elements of a RICO enterprise.

The second element requires plaintiffs to show that the defendants occupied continuing positions within the group consistent with the organizational structure established by the first element. Riccobene, 709 F.2d at 223. Because the Court finds that the plaintiffs have not alleged any organizational structure, the Court cannot determine whether the plaintiffs have alleged that the defendants occupied continuing positions.

The third element requires plaintiffs to show that the alleged enterprise had an existence separate and apart from the alleged pattern of racketeering activity. "Overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement." Id. at 224. In Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1266 (3d Cir. 1987), the court found that the separate existence requirement was satisfied where persons associated with the enterprise engaged in two separate but similar schemes. The Court notes that the Price complaint alleges that the defendants engaged in similar schemes with the Prices and Mr. Healy, and that both complaints allege that the defendants engaged in similar schemes with other elderly persons. (Price Compl. ¶ 76; Miller Compl. ¶ 68.)

Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984) and Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989) do not call for a contrary conclusion.

In Seville, the plaintiff alleged that each of the defendants - two individuals and two corporations - was an enterprise. The district court acknowledged that each of the defendants met the statutory definition of an enterprise (which includes "any individual [or] corporation"), but dismissed the complaint because the plaintiff did not plead the Turkette elements. 742 F.2d at 789-790. The Court of Appeals reversed. The Court of Appeals held that, under the notice pleading rules, the plaintiff's bare allegation that each of the defendants was an enterprise was sufficient. Id. at 790.

Seville is distinguishable from the present case because the relevant enterprises in Seville were individuals and corporations, not associations in fact. Courts can reasonably assume that individuals and corporations have an organizational structure, are continuous, and have an existence separate and apart from any alleged pattern of racketeering activity. When it comes to associations in fact, however, there is a greater risk that the RICO statute "might be improperly employed to string together predicate acts by unconnected defendants." See Zito, 2004 U.S. Dist. LEXIS 19778 at *23. In a footnote, the Court of Appeals in Seville itself held that the plaintiff could not plead

association in fact enterprises consisting of various combinations of the defendants simply by alleging that the defendants conspired with each other to commit the underlying offenses. 742 F.2d at 790 n.5.

The United States Court of Appeals for the Third Circuit accepted a minimal association in fact enterprise pleading in Shearin, but that case is also distinguishable from the instant ones. There, the court held that it was sufficient for the plaintiff to plead that "the association of Hutton Group, Hutton Inc., and Hutton Trust . . . was an enterprise . . . ." 885 F.2d at 1165. Hutton Inc. and Hutton Trust were wholly owned subsidiaries of Hutton Group. Id. at 1164. This fact is significant because courts can also reasonably assume that a relationship between a corporation and its subsidiaries will have an organizational structure and existence independent of any alleged racketeering activity. Courts cannot make that inference when a complaint alleges an association in fact between widely disparate entities and individuals, as do the complaints here.

2. Conduct or Participation – Operation or Management

A plaintiff bringing a section 1962(c) claim must not only show that an enterprise exists, but that each defendant conducted or participated in the conduct of the enterprise's

affairs.[7] The Supreme Court has interpreted the conduct or

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7. Courts have also required section 1962(c) plaintiffs to show that the defendant is distinct from the alleged enterprise. This requirement stems from the statute's language that the "person" sued must be "employed by or associated with" an enterprise. Because an enterprise cannot logically employ or associate with itself, the defendant must be distinct from the alleged enterprise. Brittingham v. Mobil Corp., 943 F.2d 297, 300 (3d Cir. 1991), citing B.F. Hirsch v. Enright Refining Co., 751 F.2d 628, 633-634 (3d Cir. 1984).

The fact that a plaintiff alleges that all of the defendants are part of an association in fact does not necessarily destroy the person-enterprise distinction. See St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 445-447 and n.16 (5th Cir. 2000) (three individuals distinct from the association in fact of the three); Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 263 (2d Cir. 1995) (individual and two corporations he owned distinct from the association in fact of the three).

When a defendant is a corporation, however, the alleged enterprise "must be more than an association of individuals or entities conducting the normal affairs" of that corporation. Brittingham, 943 F.2d at 301. In Brittingham, the plaintiffs brought a section 1962(c) claim against Mobil Oil Corporation and its subsidiary for misrepresenting the degradable qualities of a line of trash bags. Id. at 299. The plaintiffs alleged an association in fact consisting of Mobil, its subsidiary, and the advertising agencies they had hired to promote the trash bags. Id. at 300. The court found that the defendants were not distinct from the alleged enterprise. Because corporations must always act through their employees or agents, the advertising agencies were just an arm of Mobil. Thus, the alleged enterprise was just the corporation, writ large. Id. at 301.

Although Brittingham stands for the proposition that a corporate defendant is not distinct from an association in fact consisting solely of that corporation and its agents, the Supreme Court and the United States Court of Appeals for the Third Circuit have held that an individual defendant is distinct from a corporation alleged to be the enterprise, even where that individual is the corporation's president and controlling shareholder. Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001); Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995)

participation element to require plaintiffs to show that a defendant participated in the operation or management of the enterprise itself. Reeves v. Ernst & Young, 507 U.S. 170, 185 (1991).

Because the Court finds that the plaintiffs have not alleged the existence of a RICO enterprise, the Court cannot determine whether the plaintiffs have properly alleged that each of the defendants participated in the operation or management of any such enterprise. Any amended complaint in this case must allege the conduct or participation element to survive a motion to dismiss. Univ. of Maryland at Baltimore v. Peat, Marwick, Main & Co., 996 F.2d 1534, 1539 (3d Cir. 1993) (applying Reeves in motion to dismiss context).

Assuming for the moment that the enterprise alleged in each of these complaints was valid, the defendants would be distinct from that enterprise due to the inclusion of the attorneys in the enterprise. The complaints do not suggest that the attorneys were conducting the normal affairs of the Annuity Group defendants. The Miller complaint, moreover, does not suggest that National Western and American Equity were acting on behalf of the AmerUs entities.

Of course, the Court has found that the plaintiffs failed to allege a valid enterprise in these complaints because the complaints do not permit an inference of any decision-making structure connecting the Annuity Group, the Sales Group, and the attorneys. Depending on how the plaintiffs decide to amend the enterprise pleadings, the person-enterprise distinction requirement described above may preclude a finding of liability against some or all of the defendants.

3. Predicate Acts – Mail and Wire Fraud

Ultimately, a plaintiff alleging a violation of section 1962(c) must show that the defendant conducted the alleged enterprise through a pattern of racketeering activity. Here, the plaintiffs allege that the defendants engaged in a pattern of mail fraud and wire fraud, which are among the "racketeering activities" enumerated at 18 U.S.C. § 1961(1).[8] Virtually all of the defendants have moved to dismiss the RICO claim on the ground that the plaintiffs have failed to allege mail or wire fraud with the necessary particularity. Even though the Court has determined that the complaint must be dismissed for failure to plead a RICO enterprise, the Court will address the plaintiffs' racketeering pleadings so as to guide the parties in any continued litigation of these cases.

When plaintiffs allege that mail or wire fraud are the RICO predicate acts, they must plead the alleged fraud with particularity. Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir. 2004); Fed. R. Civ. P. 9(b). Plaintiffs must allege what

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8. The mail fraud statute, 18 U.S.C. § 1341, makes it a crime to mail or cause to be delivered by mail any matter or thing for the purpose of executing, or attempting to execute, any scheme or artifice to defraud. The wire fraud statute, 18 U.S.C. § 1343, makes it a crime to transmit or cause to be transmitted any communication by wire, radio, or television in interstate or foreign commerce for the purpose of executing any scheme or artifice to defraud. Thus, the statutes cover in-state mailings, but not in-state telephone calls. Annulli v. Panikkar, 200 F.3d 189, 200 n.9 (3d Cir. 1999).

the alleged misrepresentation was, and who made it to whom. Lum, 361 F.3d at 224. In addition, plaintiffs should allege when or where the alleged misrepresentation was made, or provide some "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Id., citing Seville, 742 F.2d at 791. Until a class is certified, a court must judge the adequacy of the fraud allegations solely by reference to the allegations relating to the named plaintiffs. Id. at 225, citing Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 659 (3d Cir. 1998).

Detailed allegations regarding the fraudulent scheme overall are not a substitute for detailed allegations about the acts of mail or wire fraud. See Warden v. McLelland, 288 F.3d 105, 114 (3d Cir. 2002); Rolo, 155 F.3d at 658-659. In Rolo, the plaintiffs made "quite detailed" allegations regarding the fraudulent scheme and described the contents of the mailings in "reasonably specific terms." Id. at 658. The Court held, nevertheless, that the plaintiffs failed to plead mail fraud with particularity because the complaint did not specify "when, by whom, and to whom a mailing was sent, and the precise content of each particular mailing." Id. at 659. Similarly, in Warden, the complaint provided a "reasonably clear overall picture of what has been alleged," but did "not state clearly how [the communications alleged to constitute wire fraud] were false or

misleading or how they contributed to the alleged fraudulent scheme." 288 F.3d at 114. The Court of Appeals instructed the district court to re-examine the complaint and permit the plaintiffs to amend if appropriate. Id.

Mailings and wire communications do not have to be fraudulent in and of themselves to come within the mail and wire fraud statutes. Schmuck v. United States, 489 U.S. 705, 715. (1989). They do not even have to be an essential part of the fraudulent scheme; they only need to be "incident to an essential part of the scheme." Id. at 709-710. Use of the mails or wires even after money has been obtained through allegedly fraudulent means may come within the statute if it serves to lull the alleged victim into a false sense of security and prevent detection. United States v. Sampson, 371 U.S. 75, 81 (1962).

The defendant does not have to send the mailing or wire communication personally. A defendant may be liable where he or she acts "with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Bentz, 21 F.3d 37, 40 (3d Cir. 1994).

From these cases, the Court discerns the following principle: to properly allege that a defendant committed an act of mail or wire fraud, plaintiffs must allege sufficient facts

regarding the named plaintiffs from which one can infer that the defendant used the mails or interstate wires as part of a scheme to defraud, or took some action where such use of the mails or interstate wires was reasonably foreseeable.

By this standard, some of the allegations in the complaint are too vague to state a claim for mail or wire fraud.[9] The complaint does set forth a number of reasonably specific mailings, however. With respect to the Prices, the plaintiffs have alleged that: Attorney Bohmueller sent the Prices an engagement letter and a letter appointing Ms. Larson to be the delivery agent for the living trust kit, and mailed the kit to

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9. This includes allegations that "Defendants" used "mass-mailings;" that the "Sales Group" used "written communications delivered though the mail, and oral communications . . . by means of telephone;" and that "each Defendant perpetuated their scheme" through:

> a. letters from Defendants to Plaintiffs and members of the Class;
> b. letters from Defendants to the tax advisors and/or accountants of Plaintiffs and members of the Class;
> c. mailings from Defendants to other Defendants;
> d. interstate telephone communications among Defendants;
> e. communications via email and over the worldwide web; and
> f. interstate telephone communications between Defendants and Plaintiff and members of the Class.

(Price Compl. ¶¶ 6, 77, 107; Miller Compl. ¶¶ 6, 69, 100.)

Judge Padova reached the same conclusion in Gilmour v. Bohmueller, a case involving many of the same defendants and issues, before that case was transferred to this Court as part of the instant multidistrict litigation. Gilmour v. Bohmueller, Civ. Act. No. 04-2535, 2005 U.S. Dist. LEXIS 1611 at *20-21 (E.D. Pa. Jan. 27, 2005).

EPAC; AILIC mailed the two annuities to Mr. Newmark and sent letters so informing the Prices both times; and EPAC and Mr. Newmark sent the Prices a letter regarding forthcoming newsletters and other financial planners. With respect to Mr. Healy, the plaintiffs have alleged that: Attorney Bohmueller sent Mr. Healy an engagement letter; and AAG sent Mr. Healy a letter of thanks, mailed his annuity to Mr. Krygowski, and sent additional letters to Mr. Healy and his attorney regarding his request for recision. Finally, the plaintiffs have alleged that Mr. Miller mailed a response to Mr. Weinstein's newspaper advertisement, and that American Equity mailed him a statement. (Price Compl. ¶¶ 42, 44, 52, 54, 65, 69, 71-74; Miller Compl. ¶¶ 22, 61.)[10]

The above mailings could be "incident to an essential part" of the alleged fraudulent scheme. Thus, the plaintiffs have adequately pled at least one act of mail fraud against each defendant other than BEN. The plaintiffs have expressly alleged that AAG, AILIC, EPAC, Mr. Newmark, and the attorneys directly

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10. The Court does not include the alleged telephone calls between certain members of the Sales Group and the named plaintiffs, or the call from Mr. Miller to Mr. Weinstein because the complaints do not allege, and the Court cannot reasonably infer, that any of these calls crossed state lines. The complaints allege that each of the plaintiffs resides in Pennsylvania, and that Ms. Larson, Mr. Krygowski, Mr. Strope, and Attorney Weinstein all reside and work in Pennsylvania. (Price Compl. ¶¶ 15-16, 19, 24-25; Miller Compl. ¶¶ 15, 22, 32-33.) The wire fraud statute does not cover in-state telephone calls. See note 8, above.

used or caused the use of the mails at least once. The complaint also supports an inference that Ms. Larson, Mr. Krygowski, and Mr. Strope each acted on one or more occasion with the knowledge that mailings from the Annuity Group defendants and the attorneys would follow in the ordinary course of business.

Finally, AmerUs Group Co., FFS, Patriot Group, and Addison Group (and AAG, AILIC, EPAC, Mr. Newmark, and the attorneys) may be liable under the theory of respondeat superior for the alleged racketeering conduct of their agents or employees, Ms. Larson, Mr. Krygowski, and/or Mr. Strope. "[T]he doctrine of respondeat superior may be applied under RICO where the structure of the statute does not otherwise forbid it." Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1358 (3d Cir. 1987) (respondeat superior liability not available against a corporation alleged to be the enterprise because it would violate the person-enterprise distinction requirement).[11]

4. Pattern of Racketeering Activity

The remaining question is whether the plaintiffs have alleged that each of the defendants engaged in a pattern of mail fraud. The Court will defer ruling on this question.

By definition, the RICO statute requires at least two

11. See note 7, above, regarding why the person-enterprise distinction is not currently an issue in the instant cases.

acts of racketeering activity to make out a pattern. 18 U.S.C. § 1961(5). The Supreme Court has added that plaintiffs "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239 (1989). Acts are "related" if they have the "same or similar purposes, results, participants, victims, or methods of commission." Id. at 240. "Continuity" is satisfied if there has been "a closed period of repeated conduct," or "past conduct that by its nature projects into the future with a threat of repetition." Id. at 241.

In determining whether a sufficient pattern has been alleged against a particular defendant, courts must consider only the predicate acts in which the defendant has been alleged to participate. Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990). Moreover, defendants cannot be held liable for aiding and abetting another person's predicate acts. Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 843 (3d Cir. 2000) (relying on Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994) (private plaintiffs may not maintain an aiding and abetting suit under Section 10(b) of the Securities Exchange Act of 1934)).

As the above cases demonstrate, establishing a RICO pattern depends in great part upon the plaintiffs named, the

particular defendants sued, and the predicate acts alleged. Because the Court is dismissing these complaints on other grounds, and the plaintiffs have indicated that they will file a consolidated amended class complaint covering all the putative class actions in this multidistrict litigation, the Court finds that it is not necessary to rule on the plaintiffs' pattern pleadings in their present state.

V. Conclusion

Because the plaintiffs have not properly pleaded the existence of a RICO enterprise, they cannot establish a RICO violation under Section 1962(c). The Court declines to exercise supplemental jurisdiction over the plaintiffs' state law claims at this time. Although the Court is not certain that the plaintiffs can plead a RICO enterprise and state a RICO claim against all the current defendants, the Court will grant the plaintiffs leave to amend the complaints.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: AMERICAN INVESTORS LIFE INSURANCE CO. ANNUITY MARKETING AND SALES PRACTICES LITIGATION	:	MDL DOCKET NO. 1712
Relates to: PRICE v. AMERUS ANNUITY GROUP COMPANY, No. 04-3329 and MILLER v. AMERUS GROUP COMPANY, No. 04-3799	:	

ORDER

AND NOW, this 2nd day of June, 2006, upon consideration of the Motions to Dismiss of:

- AmerUs Group Company, AmerUs Annuity Group Company, and American Investors Life Insurance Company, Inc. (Price Doc. No. 38; Miller Doc. No. 48);
- Brian J. Newmark, Estate Planning Advisors Corp., BEN Consulting Corp. ("BEN"), Funding and Financial Services Corp. ("FFS"), and Victoria Larson (Price Doc. No. 29; Miller Doc. No. 21);
- Kenneth Krygowski (Price Doc. No. 39);
- Stephen Strope (Miller Docket No. 43);
- Patriot Group (Miller Doc. No. 41);
- Barry Bohmueller (Price Doc. No. 21); and
- Brett Weinstein (Miller Docket No. 46);

and the oppositions, replies, and sur-replies thereto, and following oral argument on February 23, 2005 and a status conference on January 31, 2006, IT IS HEREBY ORDERED that said motions are GRANTED in part. The Court will dismiss all counts

as to BEN in the Price complaint; all counts as to BEN, FFS, and Mr. Newmark in the Miller complaint; and Count I as to all defendants in both complaints. The plaintiffs may file an amended complaint.

Whereas the plaintiff in Miller has voluntarily dismissed his claims against National Western Life Insurance Company ("National Western") and American Equity Investment Life Insurance Company ("American Equity"), IT IS FURTHER ORDERED that the Motions to Dismiss by National Western (Miller Doc. No. 45) and American Equity (Miller Doc. No. 47) are DENIED as moot.

BY THE COURT:

/s/ Mary A. McLaughlin

MARY A. MCLAUGHLIN, J.